HAJJAH TIJAH BT ABDULLAH

& ANOR.

v.

ROKIAH BINTI IBRAHIM

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 53 OF 1984]
12 NOVEMBER 1992

CONTRACT: Loan transaction - Transfer of property to lender - Collateral agreement to resell to borrower on terms - Extension of time for repayment of loan - Attempt to repay - Refusal by lender to re-transfer - Claim for specific performance.

The plaintiffs as the administrators of the estate of Syed Hussein bin Syed Hassan (deceased) sued the defendant for specific performance of an agreement dated 24 August 1976 made between the deceased and the defendant.

The terms of the said agreement were *inter alia* that the defendant would transfer 536/1072nd undivided share (the said property) in a piece of land held under SPK 758, Lot 552, Mukim Alor Merah, Kota Setar, Kedah to the deceased for a consideration of RM9,180 within one year from the date of the agreement.

The plaintiffs adduced evidence that the deceased had attempted to pay the amount stipulated on two occassions before the expiry of the time limited by the agreement and on both occassions he was rebuffed by the defendant who sought an extension of time to re-transfer the property. The defendant denied that she requested for an extension and denied that the deceased had made any attempts to pay the stipulated sum.

The court found as a fact that, at the material time the defendant was not in a position to re-transfer the property as she had deposited the document of title and pledged the same as collateral security for a loan she obtained from a moneylender.

Held:

[1] The plaintiffs attempted to pay the stipulated sum for the re-transfer to the defendant who asked for time to re-transfer.

[2] The defendant had no intention of complying with the agreement. She breached the said agreement.

[3] The plaintiffs were entitled to the remedy of specific performance.

[Plaintiffs claim for specific performance allowed with costs.]

Case referred to:

Ismail bin Haji Embong v. Lau Kong Han [1970] 2 MLJ 213 ***(foll)***

For the plaintiffs - Kartar Singh; M/s. Kartar Singh & Co.

For the defendant - Hamzah b. Mohamad; M/s. Syarikat Choe

JUDGMENT

K.C. Vohrah J:

The late Syed Hussein bin Syed Hassan's wife and son are the administrators of his estate and are also the 1st and 2nd plaintiffs respectively in this case.

Their claim concerns a "jual-janji" agreement dated 24 August 1976 and is principally for the specific performance of that agreement which was made between Syed Hussein and the defendant. What is prayed for is for the defendant to specifically effect a legal transfer of 536/1072nd undivided share (the said property) in a piece of land held under SPK 758, Lot 552, Mukin Alor Merah, Kota Setar, Kedah to the plaintiffs. The plaintiffs allege that Syed Hussein made an attempt to pay the amount stipulated in the agreement within the time stipulated therein with a request for the re-sale and transfer of the said property as agreed in the said agreement but the defendant reneged on the agreement. The defendant denies this allegation.

On 22 October 1973 Syed Hussein borrowed some money from the defendant. As a part of the loan transaction Syed Hussein had to and in fact transferred the said property, his property, to the defendant through a memorandum of transfer dated 22 October 1973 which was registered in the Alor Setar Land Office. A collateral agreement (the first agreement) was entered into between them on the same date wherein the defendant agreed to re-sell the said property to Syed Hussein within 3 years on payment of RM6,180 by Syed Hussein to

her. Syed Hussein stayed on the land and just before the expiry of the 3 year period he approached the defendant for an extension of a year during which to pay to the defendant the amount of RM6,180 shown in the agreement and the defendant by an agreement dated 24 August 1976 (the second agreement) gave Syed Hussein one more year within which to repurchase the said property, this time at RM9,180.

The above facts are not disputed.

The pleadings show that there is dispute as to what the actual amount of the money borrowed was and what was put down in the first agreement and whether interest was charged and whether the sum of RM9,180 shown in the second agreement included further interest but these are peripheral issues and it is obvious in their submissions that both Counsel have largely ignored these issues and have focussed on two main issues which are -

Firstly, whether Syed Hussein in 1977, before the expiry of the one year period extended by the defendant in the second agreement, attempted to pay the amount of RM9,180 stipulated in the said agreement and whether the defendant refused to accept payment of same;

Secondly, if the finding by the court is that the above allegations by the plaintiffs are not true, whether by conduct the defendant had agreed to give Syed Hussein extended time to pay the stipulated amount to repurchase the said share. If the defendant had by her conduct agreed to give to Syed Hussein extended time then on the authority of *Ismail bin Haji Embong v. Lau Kong Han* [1970] 2 MLJ 213, both Counsel agree, time was not of the essence as far the second agreement is concerned.

In regard to the second agreement (dated 24 August 1976) where it is not disputed that the defendant allowed Syed Hussein extra time of 1 year to re-purchase the said property at a new price of RM9,180, the evidence adduced on behalf of the plaintiffs is that Syed Hussein attempted to pay the amount stipulated on two occasions and on both occasions he was rebuffed by the defendant.

As regards the first occasion, the second plaintiff and son of Syed Hussein, PW2, stated that in 1977 about 2 months before the agreement was to expire he went with his father to see the defendant. They brought along RM10,000 which he (PW2) had just borrowed from one Nooraman bin Ismail to pay the defendant and to have the said property transferred to Syed Hussein. His evidence was that both the defendant and her husband asked for time to re-transfer the said property. They therefore did not pay the defendant any money.

PW2 explained how they managed to raise the RM10,000 that he and his father brought to the defendant's house. PW2 said that about 2 months before the agreement was to expire, he went to see Nooraman bin Ismail and borrowed RM10,000 from him. He left the document of title in respect of another piece of land belonging to his father in Noorman's hands and promised to have the land sold to him if he could not pay the loan within one year. He added that the loan could not be paid and so the land was sold to Nooraman. The exhibit in Agreed Bundle D, pp. 9 and 10, a stamped transfer form, Form 14A, shows that on 19 July 1978 Syed Hussein did indeed transfer a piece of land to Nooraman bin Ismail for RM38,000. PW2 explained that Nooraman paid him RM28,000 on execution of the transfer form after deducting the RM10,000 taken earlier by him. PW2 gave evidence that Noorman is no more in Kedah and said he could not trace him.

As regards the second occasion when an attempt was made to pay the defendant, the evidence of PW2 was that his father waited in vain for the defendant to do something after his first visit to her house to pay her and just 2 or 3 days before the date of the expiry of the agreement the father went to the defendant's house with him. This time they brought along one Omar bin Ali (PW3), (a friend, who in 1973, had identified Syed Hussein to the Collector of Land Revenue when Syed Hussein transferred his property to the defendant).

PW2 said he brought along the RM10,000 he had borrowed. The three of them met with the defendant and her husband. They then requested the defendant to go to the Land Office with them to re-transfer the said share to Syed Hussein and the defendant told them to go and wait at the Land Office. The three of them went to the Land Office and waited for the defendant. She did not turn up. Instead her husband came to the Land Office and informed them that the defendant could not come as she had work to do.

PW3, Omar bin Ali, confirmed that he went with PW2 and Syed Hussein to the defendant's house about 2 or 3 days before the expiry of the second agreement to "redeem" the property and they were told to go and wait at the Alor Setar Land Office and that they went there and waited for the defendant in vain; the defendant's husband came to the Land Office and told them that the defendant could not come.

The defendant denied that she requested for extension of time to re-transfer the property. She said that Syed Hussein requested for an extension of time to pay her and she denied that PW2, Syed Hussein and Omar bin Ali had visited her and invited her to go to the Land Office to re-transfer the said share.

PW2 alleged that the 2 meetings with the defendant took place in 1977. It has to be noted that on 18 December 1974 the defendant herself borrowed money from a moneylender and that she deposited the document of title in respect of the said land "to the extent of 1/2 undivided share therein" to the moneylender and "pledged the same as collateral security for the loan... subject to the promissory note" (see Agreed Bundle of Documents "C", pp. 4 to 6). The defendant was sued for the balance of the principal amount borrowed and interest thereon on 28 March 1979 and judgment was obtained against her in default of her appearance on 19 June 1979 (see Agreed Bundle of Documents, "C", p. 8). On 20 March 1980 an order for execution was obtained for the seizure of the said land and for the sale of it to the extent of 1/2 undivided share belonging to the defendant. The plaintiffs tried to settle the judgment debt with the moneylender but the defendant, however, settled the debt sometime in March 1981 (see Agreed Bundle of Documents "B", p. 6). It seems to be beyond doubt that in 1977 (the year the defendant's agreement with Syed Hussein expired) that the defendant did not have the document of title in respect of the said land with her; it was in the hands of a moneylender and she clearly lied when she insisted she had it in her possession from 1975 to 1983.

On the other hand I find PW2 and PW3 to be truthful witnesses and I believe the story of PW2 that he visited the defendant with his father two months before the expiry of the agreement in order to pay her and have the said share transferred to his father and that the defendant and her husband asked for time to re-transfer the property. She could not have re-transferred the property as the document of title was not in her hands but in the hands of a moneylender at that time. I also believe the story of PW2 that he had the money to pay the defendant as he had borrowed money from Nooraman to pay for it. His story of pledging another piece of his father's land which he eventually had to sell to Nooraman (evidenced by a memorandum of transfer) is highly persuasive to show that he did have the money to pay for the re-transfer of the property to his father. And I believe his story and that of PW3 that two or three days before the date of expiry of the second agreement the defendant did not turn up at the Land Office as promised to transfer the said property to Syed Hussein.

The defendant clearly had no intention of complying with the second agreement - she clearly breached the said agreement - and there is no need for me to deal with the second issue whether the defendant had by her conduct agreed to extend the time for the father of PW2 to pay the amount stipulated in the second agreement. The plaintiffs are clearly entitled to the remedy of specific performance.

The plaintiffs are now in possession of the document of title which they obtained after intervening in the execution proceedings in Pelaksanaan 76-132-90 where there was an order for the seizure and sale of the said land in respect of a judgment obtained by another moneylender against the defendant. The plaintiffs paid the judgment sum RM6,130.34 owed by the defendant to the judgment creditor in that case and obtained the document of title in respect of the said land. What is owed to the defendant is therefore RM9,180 less RM6,130.34, that is, RM3,049.66.

The defendant shall specifically perform the written agreement dated 24 August 1976 by immediately effecting legal transfer of 536/1072nd undivided share in land held by her under SPK 758, Lot 552, Mukim Alor Merah, Kota Setar to the plaintiffs upon the plaintiffs paying her the sum of RM3,049.66 within one month of this judgment.

Should the defendant refuse to execute the transfer after payment is made, the Senior Assistant Registrar of the High Court shall execute the said transfer on her behalf. Costs to the plaintiffs.